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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1171

LASALLE NATIONAL BANK, Trustee, Appellant, v. COUNTY BOARD OF SCHOOL TRUSTEES OF DUPAGE COUNTY, et al., Appellees.—PULLMAN BANK AND TRUST CO., Trustee, et al., Appellants, v. TRUSTEES OF SCHOOLS OF TOWNSHIP 37 NORTH, RANGE 13 EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS, Appellees.

LASALLE NATIONAL BANK, a National Banking Association, as Trustee under Trust Agreement dated November 25, 1960 and known as Trust No. 17797,

Petitioners,

vs.

COUNTY BOARD OF SCHOOL TRUSTEES OF DUPAGE COUNTY, a Body Politic and Corporate; HINSDALE ELEMENTARY SCHOOL DISTRICT 181; and MAC DIARMID-PALUMBO, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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BLEED THROUGH

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LASALLE NATIONAL BANK, a National Banking Association, as Trustee under Trust Agreement dated November 25, 1960 and known as Trust No. 17797,

Petitioners,

vs.

COUNTY BOARD OF SCHOOL TRUSTEES OF DUPAGE COUNTY, a Body Politic and Corporate; HINSDALE ELEMENTARY SCHOOL DISTRICT 181; and MAC DIARMID-PALUMBO, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

The petitioner, LaSalle National Bank, a National Banking Association, as Trustee under Trust No. 17797, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered in this proceeding on September 26, 1975.

OPINIONS BELOW

The Opinion of the Supreme Court of Illinois, filed on September 26, 1975, has not yet been officially reported, but is reproduced in Appendix A.

The Petition for Rehearing filed in the Supreme Court of Illinois was denied without comment on November 21, 1975. A copy of the order is reproduced in Appendix B.

The Opinion of the Appellate Court of Illinois, Second District, filed on November 21, 1974, is reported at 23 Ill. App. 3d 575, 319 N.E. 2d 593 (1974). Rehearing was denied without comment on December 17, 1974.

The Judgment Order of the Circuit Court for the 18th Judicial District, DuPage County, Illinois, filed on December 11, 1973, is not reported.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on September 26, 1975 (Appendix A).

On November 21, 1975, the Supreme Court of Illinois denied the petition for rehearing filed by LaSalle National Bank, as Trustee.

The jurisdiction of this Court is invoked under 28 U.S.C., §1257 (3).

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QUESTIONS PRESENTED

(1) Whether there has been an unconstitutional denial of equal protection of the laws when various Illinois landowners, whose lands have been condemned for public purposes which failed, successfully litigate to reacquire their property, but, under essentially identical circumstances, other landowners including Petitioner are held to forfeit their lands forever.

(2) Whether there has been an unconstitutional denial of due process when various Illinois landowners, whose lands have been condemned for public purposes which failed, successfully bring original court actions to reacquire the lands lost in prior condemnation proceedings, but, under essentially identical circumstances, other landowners including Petitioner are foreclosed by the court by virtue of the prior condemnation cases from an original forum in which to litigate the same type of issues.

(3) Can the power of eminent domain be extended to allow retention of lands erroneously or prematurely condemned for a public purpose which never occurs and is publicly abandoned?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Constitution of 1970, Article I, Section 2:

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

Illinois Constitution of 1970, Article I, Section 15:

Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law.

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The Illinois School Code, Section 10-22.35A (Ill. Rev. Stat. 1969, ch. 122, par. 10-22.35A):

[The School Board shall have the powers]

To buy or lease one or more sites for buildings for school purposes with necessary ground, including sites purchased under Section 10-22.31b, or to buy or lease sites and facilities for school offices. The purchase of such sites or office facilities may be by contract for deed when the board deems such contract advantageous to the district, but any such contract or any transaction arising out of such contract may not exceed 10 years in length, and interest on the unpaid balance of such contract may at no time exceed 6% per annum.

To take and purchase the site for a building for school purposes either with or without the owner's consent by condemnation or otherwise. To pay the amount of any award made by a jury in a condemnation proceeding. To select and purchase all such sites and office facilities desired without the submission of the question at any referendum, or to enter into an option to purchase with respect to any such site or sites and facilities for school offices.

The Illinois School Code, Section 10-22.36 (Ill. Rev. Stat. 1969, ch. 122, par. 10-22.36):

[The School Board shall have the power]

To build, purchase or move a building for school purposes or office facilities upon the approval of a majority of the voters upon the proposition at an election called for such purpose by the board.

The questions of building one or more new buildings for school purposes of office facilities, and issuing bonds for the purpose of borrowing money to purchase one or more buildings or sites for such buildings or office sites, to build one or more new buildings for school purposes or office facilities or to make additions and improvements to exist-

ing school buildings, may be combined into one or more propositions on the ballot.

Before erecting, or purchasing or remodeling such a building the board shall submit the plans and specifications respecting heating, ventilating, lighting, seating, water supply, toilets and safety against fire to the county superintendent of schools having supervision and control over the district, for his approval.

The Illinois School Code, Section 5-22 in applicable part (Ill. Rev. Stat. 1969, ch. 122, par. 5-22 in part):

When in the opinion of the school board, a school site, or portion thereof, building, or site with building thereon, or any other real estate of the district, has become unnecessary or unsuitable or inconvenient for a school, or unnecessary for the uses of the district, the school board, by a resolution adopted by at least two-thirds of the board members, may direct that said property be sold in the manner herein provided. The school board shall forthwith notify the trustees of schools or other school officials having legal title to such land of the terms upon which they desire the property to be sold. The trustees of schools or other school officials having legal title to such land shall, within 60 days after receiving such notice, sell the property at public sale, after first giving notice of the time, place, and terms thereof . . ."

STATEMENT OF THE CASE

Prior to 1970, the petitioner LaSalle National Bank, as Trustee, was the owner in fee simple absolute of an undeveloped tract of land 180 acres in area, located in DuPage County, Illinois. This tract was as yet undeveloped but plans were in progress to develop it as a residential area, for which it was ideally suited.

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Late in 1969, thirty acres of this tract became the target for condemnation by the Respondents County Board of School Trustees and Hinsdale Elementary School District (hereinafter collectively referred to as "School Board") for the alleged purpose of constructing a 5.5 million-dollar junior high school. Under Section 10-22.35A of the present Illinois School Code, Respondent is permitted to condemn property without submitting the issue of condemnation to a referendum, and it did so in this case. (However, the issue of whether to build a school must, as a matter of law, go to referendum.)

Subsequently on September 1, 1970, the circuit court purportedly awarded Respondent a "fee simple" in the 30 acres for the purpose alleged, and awarded Petitioner $360,000 as just compensation therefor.

Thereafter, the Respondent, as required by Section 5-22 of the Illinois School Code, submitted to referendum the question of whether to build the proposed junior high school. This referendum failed in a manner that persuaded Respondent to abandon this land as a possible school site.

Thus, in August of 1972, Respondent let the property for public sale. Although Petitioner attended the sale, demanded the return of its land, and offered to tender back the court award, Respondent felt compelled under Section 10-22.36 of the Illinois School Code to auction it off to the highest bidder (Respondent Mac Diarmid-Palumbo, Inc.) at $425,000, taking a profit of $65,000.

On August 31, 1972, Petitioner filed a complaint for injunctive relief, seeking to restrain the Respondent School Board from conveying whatever title it held to Respondent MacDiarmid-Palumbo, Inc., and to require reconveyance of the property to Petitioner. The complaint alleged illegal

and arbitrary use of the constitutional power of eminent domain in that the land was condemned by a public body, but was never used or even legally committed to be used for a public purpose. A corollary claim to reacquire the land was based on the history of the law of eminent domain with regard to school districts in Illinois which had been that, absent a legislative statement to the contrary, school boards could constitutionally condemn only a fee simple determinable with a right of reentry upon failure of the public purpose. Petitioner argued that any other result would be a public taking of private land for no public purpose in derogation of the Fifth and Fourteenth Amendments to the United States Constitution as well as of the applicable sections of the Bill of Rights in the Illinois Constitution.

Respondent School Board filed a motion for summary judgment, arguing essentially that the prior condemnation case was *res judicata* because in that decree, the trial judge stated he was awarding a "fee simple." Therefore, it was argued, a fee simple absolute with no right of reverter vested in the School Board, regardless of whether the stated public purpose was ever authorized or came into being, and regardless of a large body of case law in Illinois holding to the contrary.

The trial court without opinion granted Respondent's motion for summary judgment and denied Petitioner's countermotion for summary judgment. It is from this order that Petitioner appealed.

The unstated holding of the circuit court order is that an absolute fee was awarded when the condemnation case was decided. Therefore, on appeal to the Illinois Appellate

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Court, Petitioner raised the resulting issue of at what point in time could such a fee constitutionally vest when a specific public purpose is alleged in order to condemn private property, but that public purpose is impossible without or until approval through a public referendum. Petitioner argued that, at best, a condemnation court had only the power to award a determinable fee conditioned upon the required referendum approval to confirm the alleged public purpose. Any other result would result in the seizure of land in derogation of the Fifth and Fourteenth Amendments to the United States Constitution and of Section 2 and 15 of Article I of the 1970 Illinois Constitution (and their counterparts in the 1870 Illinois Constitution).

The Appellate Court refused to consider any of the constitutional issues raised by Petitioner, holding that the original condemnation case barred any and all such issues under the doctrine of *res judicata*.

Petitioner petitioned the Illinois Supreme Court to review the opinion of the appellate court, raising the additional issue of denial of equal protection of the law under the United States and Illinois Constitutions for the following reason. During the pendency of Petitioner's case, an identical case entitled *Soiltest, Inc.* v. *Trustees of Schools of Township 41 North, etc.* was decided in the Circuit Court of Cook County, Illinois. Under that case, as in Petitioner's, the public purpose for which the land had been condemned never came into being and the court held that the land reverted to the original condemnee from whom the land had been seized. (See Appendix C.)

The Illinois Supreme Court granted the petition for leave to appeal. It also granted the petition of Pullman Bank and

Trust Company in *Pullman National Bank and Trust Company* v. *Trustees of Schools of Township No. 37 North, etc.* Since the facts of that case and opinions below were almost identical to the Petitioner's case, the two cases were consolidated for purposes of argument and opinion.

However, after further briefs and arguments, the court on September 26, 1975, affirmed the appellate court holding that all issues raised were barred by the condemnation case under the doctrine of *res judicata.*

In its petition for rehearing filed in the Illinois Supreme Court, Petitioner argued that the application of the doctrine of *res judicata* in this instance resulted in a denial of due process and elevated form above substance. It argued that to require a litigant to raise hypothetical issues in a condemnation case was contrary to the case in controversy principles of American jurisprudence and unconstitutionally forecloses litigation of such issues when they subsequently actually occur. The Petition for Rehearing was summarily denied on November 21, 1975.

After the termination of Petitioner's case in the state judicial process and during preparation of this appeal, yet another set of Illinois landowners have successfully litigated the return of their condemned land in *City of Chicago in Trust for the Use of Schools* v. *Albert J. Schorsch Realty.* (See Appendix D.)

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REASONS FOR GRANTING THE WRIT

I.

PETITIONER, AS WELL AS OTHER ILLINOIS LANDOWNERS, HAVE BEEN AND WILL CONTINUE TO BE DENIED EQUAL PROTECTION OF THE LAWS.

In the case at bar, Petitioner's land was condemned by the Respondent School Board for the express purpose of building a multimillion dollar school. Subsequently, the Respondent abandoned this announced purpose and auctioned the land to the highest bidder. Prior to the auction, Petitioner offered to return the amount awarded in the condemnation action for a return of the land. Respondent refused. At that point, Petitioner instituted an original court action to assert its right of reverter or reacquisition.

The courts that heard this case determined that Petitioner was barred by the doctrine of *res judicata* from litigating any issues it raised concerning its former property, because any and all such issues should have been raised in the original condemnation case. (Essentially the same process of condemnation, failure of public purpose, and auction occurred in the *Pullman* case which was consolidated on leave to appeal by the Illinois Supreme Court with the case at bar for purposes of argument and opinion.)

Yet over a similar period of years, other Illinois landowners were successfully maintaining original court actions for the return of their properties which had been condemned in prior court actions by public bodies. (Appendices C and D.) In fact, in the *Soiltest* case (Appendix C), the lower

court ruled that the substantive Illinois law on the subject of land titles was as Petitioner has argued throughout the case at bar, and such was the basis for its decision that the land reverts to the condemnee. The condemnation order that was the subject of the *Soiltest* case contained the almost identical "boiler-plate" language, including the liberal use of the term "fee simple", which appears in most land condemnation orders in Illinois today, and which appeared in the condemnation order involved in Petitioner's case.

It is now axiomatic in this country that no greater burdens should be placed, either by law or by the State, upon one than upon others in the same conditions.

> "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74, 30 L.Ed. 220, 227 (1886).

Although neither the courts of Illinois nor the Respondent and the other public bodies referred to herein have "evil eyes," unequal results are being achieved which materially affect one of the most basic rights of American citizens—the right to own property.

At a time in our history when property rights appear to be well circumscribed with protections, and the less tangible rights of the person are more in the forefront of those rights in need of protection, it would indeed be a step backward in time if such unequal treatment and injustice toward landowners were permitted to stand.

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II.

DUE PROCESS OF LAW HAS BEEN DENIED PETITIONER BY THE ERRONEOUS APPLICATION OF THE DOCTRINE OF RES JUDICATA.

Throughout the case at bar, Petitioner has attempted to litigate the issue of its possibility of a reverter in the land, which could arise only when the attempted public purpose became impossible. And throughout this case, Petitioner has been foreclosed from doing so by the Illinois courts' rigid and erroneous applications of the doctrine of *res judicata*. A clear denial of the constitutionally guaranteed due process of law resulted.

If ever this doctrine has been misapplied, the case at bar is one such vivid misapplication. This was an original proceeding to assert and enforce a right of reverter which came into being subsequent to the condemnation suit when the public purpose failed to come into being. With all due respect to the author of the Appellate Court Opinion, who states that this reverter is a question that should have been raised before him when he was sitting as the trial judge in the condemnation action, it is a fact that the right to a reverter could not and did not arise until after the condemnation trial. Until the public purpose failed, Petitioner had only a possibility of a reverter (See 17 I.L.P. Eminent Domain, §166), which it had no standing to assert before the condemnation judge.

The applicable rule has been stated:

> "Under no circumstances will a former judgment or decree take effect on rights not then existing." 23 I.L.P. Judgments, §379, and cases cited therein.

See also, *People ex rel. Adams* v. *McKibben*, 377 Ill. 22, 35 N.E. 2d 321, 322-23 (1941), wherein the court clearly

establishes the inapplicability of *res judicata* in cases where the claim in the second suit is different from the claim in the prior suit. In the condemnation suit, the Respondent School Board claimed Petitioner's land for an intended public purpose. In this second suit, Petitioner claims its land back for failure of that public purpose.

In this original proceeding, Petitioner also asserted damages to the remainder of its property caused by the failure of the public purpose. This too was not a collateral attack on the 1970 Judgment Order of Condemnation, but constituted a new action for damages which occurred subsequent to the condemnation suit. Respondent's intention to place a 5.5 million-dollar school adjacent to the remainder of Petitioner's land which was to be developed residentially would not result in damages to the remainder. See *Mattion* v. *Trustees of Schools of Township 41*, 2 Ill. App. 3d 1035, 1038, 279 N.E. 2d 66, 68 (1971). However, when the Respondent abandoned its interest in developing the land for a public purpose, an entirely new question of damages arose as to Petitioner's remainder not precluded by *Mattion*.

In the past, Illinois courts have entertained a subsequent action when the public purpose is abandoned or becomes impossible. For example, in *Bell* v. *Mattoon Water Works Co.*, 245 Ill. 544, 549, 92 N.E. 352 (1910), the Illinois Supreme Court found no obstacle to entertaining such a suit, noting (245 Ill. at 550):

> "If it should turn out that the corporation could not use a substantial portion of the land for the purpose for which it was taken, the fact that the court had, on the showing made before it, been of opinion the land sought to be taken was not unreasonable or unnecessary and permitted it to be condemned, would not give the corporation the right to retain the land for other uses or to retain it without using it for any purpose."

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To the same effect is *Miner* v. *Yantis*, 410 Ill. 154, 102 N.E. 2d 524 (1951), followed by *Kelly* v. *Bowman*, 104 F. Supp. 973 (E.D. Ill. 1952).

In summary, the Illinois courts have procedurally barred Petitioner from its day in court, without citing a single applicable case involving reversionary interests in support thereof. At the same time, other landowners in Illinois are successfully litigating similar or identical cases. Such a rigid application of the doctrine with such inequitable results is inapposite to the holdings of this Court. In *Wolff* v. *McDonnell*, 418 U.S. 539, 557-58, 41 L.Ed. 2d 935, 952, 94 S.Ct. 2963 (1974), this Court, in analogy, referred to the accepted due process analysis as to property and stated:

> "The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests. *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 168, 95 L.Ed. 817, 71 S. Ct. 624 (1951) (Frankfurter, J., concurring). The requirement of some kind of a hearing applies to the taking of private property, *Grannis* v. *Ordean*, 234 U.S. 385, 58 L.Ed. 1363, 34 S. Ct. 779 (1914). . . .
>
> "The touchstone of due process is protection of the individual against arbitrary action of government, *Dent* v. *West Virginia*, 129 U.S. 114, 123, 32 L.Ed. 623, 9 S. Ct. 231 (1899)."

The power of eminent domain reaches far back into the history of western civilization, but it is conditioned upon the actual need for the land by the public body seizing it for use by the public. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 324-25 (1892). In the case at bar, a public body, which admittedly does not need the land it either erroneously or overenthusiastically seized, is to be allowed to keep the land and sell it at a handsome profit because of the misapplication of the doctrine of *res judi-*

cata combined with a somewhat "open-ended" School Code which requires state court interpretation.

> "'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against stealthy encroachments thereon.'" *Monongahela Navigation Co.* v. *United States*, 148 U.S. at 325, citing Mr. Justice Bradley in *Boyd* v. *The United States*, 116 U.S. 635.

Petitioner in the case at bar has even been foreclosed from asserting its constitutional rights.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Illinois.

Respectfully submitted,

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February 13, 1976

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APPENDIX A

Opinion of the Supreme Court of Illinois

Docket Nos. 47284, 47477 cons.—decided September 26, 1975

LA SALLE NATIONAL BANK, Trustee, Appellant, v. COUNTY BOARD OF SCHOOL TRUSTEES OF DU PAGE COUNTY *et al.*, Appellees.—PULLMAN BANK AND TRUST CO., Trustee, *et al.*, Appellants, v. TRUSTEES OF SCHOOLS OF TOWNSHIP 37 NORTH, RANGE 13 EAST, OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS, Appellees.

MR. JUSTICE WARD delivered the opinion of the court:

These appeals involve similar questions and were consolidated for argument and opinion. The questions relate to the character of the estate that a school board may acquire through an eminent domain proceeding and to the effect of the condemnation judgment.

The appeal in No. 47284, LaSalle National Bank v. County Board of School Trustees of Du Page County *et al.*, is from a judgment of the appellate court (23 Ill. App. 3d 575) that La Salle National Bank (hereafter La Salle) could not in a subsequent proceeding attack an earlier condemnation judgment in favor of the County Board of School Trustees of Du Page County (Board).

The Board under its eminent domain authority (Ill. Rev. Stat. 1969, ch. 122, par. 10-22.35A) filed a petition in the circuit court of Du Page County to condemn a 30-acre

tract of land, title to which was held by La Salle as the trustee. On September 21, 1970, the circuit court entered an order, based on a stipulation between the parties, awarding La Salle $360,000 and vesting title in fee simple in the Board. There was no appeal from this judgment. The intention of the Board to construct a school on the site was defeated when the voters of the school district voted against the proposal. Subsequently the Board, under its statutory authority (Ill. Rev. Stat. 1971, ch. 122, par. 5-22), determined that it would be in the best interests of the school district to sell the land at a public sale. At the sale the Board accepted the bid of MacDiarmid-Palumbo, Inc., a defendant here, of $425,000. A bid of $360,000 by La Salle was rejected. La Salle filed suit in August 1972, in the circuit court of Du Page County in behalf of the former beneficial owners of interest in the parcel seeking to restrain the Board from transferring title to Mac Diarmid and contending that the Board did not have title in fee simple to the land. La Salle alleged that it had retained a reversionary interest in the land. The circuit court granted the defendants' motion for summary judgment and La Salle appealed to the appellate court. That court, without reaching the issue of the estate that the Board acquired, held that La Salle was barred under the doctrine of *res judicata* from challenging the judgment of the circuit court of Du Page County which vested title in the Board. (*La Salle National Bank* v. *County Board of School Trustees*, 23 Ill. App. 3d 575, 578.) We granted La Salle's petition for leave to appeal.

The circumstances of No. 47477, Pullman Bank and Trust Co., Trustee, *et al.*, v. Trustees of Schools of Township

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(Appendix A)

No. 37 North *etc.*, are similar. In September of 1957 the Trustees of Schools of Township No. 37 North (hereafter, Trustees) filed a petition in Cook County to condemn land held by Pullman Bank and Trust (Pullman) as a trustee. (Ill. Rev. Stat. 1955, ch. 122, par. 7-17.) In March, 1960, a judgment was entered awarding Pullman $48,000 and vesting title in fee simple in the Trustees. There was no appeal. The land was not used as a school site, and in September, 1969, and again in May of 1970 the Trustees offered to sell the land at a public sale for a price not less than $400,000. (Ill. Rev. Stat. 1967, ch. 122, par. 5-22.) However, the highest bid received for the land was $280,000. Pullman filed an action in November, 1969, against the Trustees in the circuit court of Cook County alleging it had retained in the land after the condemnation proceeding the same type of interest as La Salle claimed. The circuit court held for the Trustees, and in the subsequent appeal by Pullman the appellate court held that the Trustees had been given title in fee simple in the condemnation proceeding and that Pullman's subsequent questioning of the estate that was taken by the Trustees was barred under *res judicata*. (26 Ill. App. 3d 604, 609.) We granted Pullman's petition for leave to appeal and consolidated the two appeals.

Since the questions raised and the arguments presented by the plaintiffs La Salle and Pullman are similar, we may consider them together. The plaintiffs argue that their contentions are not barred under the doctrine of *res judicata* because they are different from those raised in the original condemnation proceedings. They contend, too, that in an eminent domain proceeding a school board acquires not

fee simple title but rather a base or determinable fee and when the acquired land is no longer used for school purposes, there is a reversion to the land's former owner. However, because of the disposition we make of the plaintiff's first contention we shall not reach their second claim.

The records in these cases show that the circuit courts' judgments in the eminent domain actions stated that title in fee simple to the respective parcels was to be vested in the Board and the Trustees. In the La Salle action, the court's judgment order stated in part:

> "To the owner or owners of and party or parties interested in said real property for the fee simple title to said property, which is legally described as follows: * * * as full compensation to the owner or owners * * * for the fee simple title to said property * * * the sum of Three Hundred Sixty Thousand And No/100 Dollars ($360,000)."

In the Pullman action the order declared that the court awarded to Pullman "for the taking of the fee simple title to said land, the sum of Forty Eight Thousand ($48,000.00) and no/100th Dollars." There is nothing to show the plaintiffs sought to retain any reversionary interests and nothing to indicate that the parties and the trial court were concerned with any estate less than a fee simple. The question is whether the plaintiffs can now attack in collateral proceedings these judgments which declared the condemnors were acquiring titles in fee simple.

A fundamental statement of the doctrine of *res judicata* was made by this court in *People* v. *Kidd*, 398 Ill. 405, 408:

(Appendix A)

> "* * * a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." See *People ex rel. McAllister* v. *East*, 409 Ill. 379, 383; *Chicago & Western Indiana R.R. Co.* v. *Alquist*, 415 Ill. 537, 541.

And in *People ex rel. McAllister* v. *East*, 409 Ill. 379, 383, it was said:

> "* * * however erroneous the decision may be, it is binding upon all parties until it is reversed or set aside in a direct proceeding for that purpose. In other words, the court having jurisdiction has jurisdiction to decide erroneously as well as correctly."

The doctrine of *res judicata* extends not only to what actually was decided in the original action but also to matters which could have been decided in that suit. This was illustrated in *Harvey* v. *Aurora and Geneva Ry. Co.*, 186 Ill. 283, where, as Pullman and La Salle seek to do here, the plaintiffs in error sought to make a collateral attack on the condemnation judgment. The defendant in error in *Harvey* had obtained permission from the city of Geneva to lay tracks for its railway. With statutory authority it filed a petition to condemn certain land of the plaintiffs in error which was necessary for the railway, and obtained a judgment. The plaintiffs in error vigorously disputed the right of the defendant in error to have the land condemned, and three successive appeals to this court were taken. On the third appeal the plaintiffs in error argued for the first

time that the railroad had exceeded the authority given it by the city of Geneva to lay track, and had laid track in an area where it had no permission to do so. They contended that this should provide an effective defense to the petition to condemn their property. This court, after observing that this question as to the proper authority from the city of Geneva could have been raised earlier, stated, in rejecting the argument of the plaintiffs in error:

> "* * * The previous decisions of the court concerning the right to take the property of plaintiffs in error settled every question which might have been raised and every objection that might have been made, whether then raised and made or not. The doctrine of *res judicata* embraces not only what has been actually determined in the former suit, but also extends to any other matter which might have raised and determined in it." *Harvey* v. *Aurora and Geneva Ry. Co.*, 186 Ill. 283, 294; see also *Bell* v. *Mattoon Water-works and Reservoir Co.*, 245 Ill. 544, 548.

More recently, this was illustrated in *People ex rel. White* v. *Busenhart*, 29 Ill.2d 156, which involved an appeal that arose out of the condemnation of land for use as a school site. The circuit court denied leave to file a taxpayer's complaint for an injunction against the expenditure of public funds. (Ill. Rev. Stat. 1961, ch. 102, pars. 11 through 16.) Nine paragraphs of the complaint were allegations that related to the original eminent domain action, the judgment in which had been affirmed by this court prior to the filing of the petition for leave to file. (*Trustees of Schools* v. *Schroeder*, 25 Ill.2d 289.) On appeal from the denial of leave to file, this court stated:

BLEED THROUGH

(Appendix A)

"* * * That [the earlier eminent domain judgment] judgment is not subject to collateral attack since the court had jurisdiction of the subject matter and the parties. (*Chicago and Western Indiana Railroad Co.* v. *Alquist*, 415 Ill. 537; *Chicago and Alton Railroad Co.* v. *Springfield and Northwestern Railroad Co.*, 67 Ill. 142.) Consequently, these points were improperly pleaded inasmuch as they constitute a collateral attack upon the judgment of the court vesting title in the School Trustees." *People ex rel. White* v. *Busenhart*, 29 Ill.2d 156, 162.

In the eminent domain proceedings here judgments were entered that the school trustees who had instituted the actions were to take fee simple estates. The jurisdiction of those courts is not disputed. La Salle and Pullman had the opportunity to contend in the eminent domain action that the school authorities would take less than a fee simple estate but did not do so. No appeals were taken from those final judgments. The judgments are not now subject to collateral attack. Pullman and La Salle cannot litigate the question they could have had decided in the original proceedings.

La Salle argues that a former judgment cannot bar a right not yet in existence and that since it had only a possibility of reverter until the parcel of land was put up for sale, its action is not barred by *res judicata*. However, in making this argument La Salle of course is gratuitously assuming that the Board received a determinable fee and not a fee simple. As we have pointed out, La Salle is precluded from collaterally challenging the judgment vesting a fee simple in the Board.

(Appendix A)

Another contention of La Salle is that the title was never vested in the Board, as the referendum which would have allowed the Board to construct the school was defeated. A consequence of the defeat, La Salle says, was that the public purpose for the taking of the land, the construction of a school, never came into existence. However, the right of the Board to condemn the property for use as a school site was not dependent on the approval of the voters for the construction of the school. The Board, under the statute, had an independent authority to acquire the land. *County Board of School Trustees* v. *Boram,* 26 Ill.2d 167.

There is no substance to La Salle's complaint that the Board's sale of the land may cause damage to the remainder held by La Salle. As the holder of title in fee simple the Board, upon the failure of the contemplated public purpose, was free to convey the land, regardless of complaints by other landowners. We have a statute (Ill. Rev. Stat. 1973, ch. 122, par. 5-22) which specifically authorizes sale when the property has become "unnecessary" for school use.

For the reasons given, the judgments of the appellate courts in both appeals are affirmed.

Judgments affirmed.

APPENDIX B

Order of the Supreme Court Denying Rehearing

State of Illinois

Office of
CLERK OF THE SUPREME COURT
Springfield
62706

November 21, 1975

Sneider and Troy
Attorneys at Law
One North LaSalle Street
Chicago, Illinois 60602

No. 47284—LaSalle National Bank, a National Banking Association, as Trustee, etc., at al., etc., appellants, vs. County Board of School Trustees of DuPage County, etc., et al., etc., appellees. Appeal, Appellate Court, Second District.
47477 Cons.

You are hereby notified that the Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

APPENDIX C

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT — CHANCERY DIVISION

SOILTEST, INC., Plaintiff, vs. **TRUSTEES OF SCHOOLS of Township 41 North, Range 14 East of the Third Principal Meridian, Cook County, Illinois and COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 65, Cook County, Illinois,** Defendants.	**No. 72 CH 4368**

DECREE
(Filed April 11, 1973)

This cause coming on to be heard on March 14, 1973 on the motion of Soiltest, Inc., hereinafter referred to as Plaintiff, for judgment on the pleadings, or, in the alternative, summary judgment and the Motion of Trustees Of Schools of Township 41 North, Range 14 East of the Third Principal Meridian, Cook County, Illinois, hereinafter referred to as Defendant-Trustees also for judgment on the pleadings, or, in the alternative, summary judgment, and

The Court having considered the complaint of the Plaintiff, the motion to dismiss of Defendant-Trustees, the aforesaid motion for judgment on the pleadings, or, in the alternative, summary judgment by Plaintiff and Plaintiff's memorandum of law in support thereof, the aforesaid motion (also for judgment on the pleadings, or, in the alternative, summary judgment) by Defendant-Trustees and Defendant-Trustees' memorandum of law in support thereof, and

(Appendix C)

Plaintiff's memorandum of law in response to Defendant-Trustees' last mentioned memorandum of law; and the parties having stated in their pleading and the Court having found that there are no issues of fact to be determined herein; and the Court having heard argument by counsel for Plaintiff and Defendant-Trustees in support of their respective motions for summary judgment; and the Court being fully advised in the premises; and the Court having found that upon consideration of all of the above and all of the relevant law, Plaintiff's motion for summary judgment should be granted, and Defendant-Trustees' motion for summary judgment or in the alternative judgment on the pleadings should be denied, and

The Court having found that all right, title, and interest of all defendants herein to the subject property, being Lots 13-24, inclusive, in Block 4, in Grant's Edition to Evanston, being the East two-thirds (E.⅔) Rods of the South Half (S.½) of the Northwest quarter (N.W.¼) of Section 24, Township 41 North, Range 13, East of the Third Principal Meridian of Cook County, Illinois, is a fee simple determinable title as granted by the judgment order entered on May 20, 1966 in Case No. 66 L 3577, which determinable fee has determined and terminated by operation of the law, and

The Court finding that all title of defendants in the subject property has now, by operation of law, reverted to Plaintiff herein and that Community Consolidated School District No. 65, Cook County, Illinois, hereinafter referred to as Defendant School District, formally confirmed that the subject property is not to be used for school purposes, and

(Appendix C)

The Court finding it equitable that Plaintiff tender to Defendant-Trustees the sum of $88,000.00, being the sum heretofore paid by said Defendant to Plaintiff pursuant to the aforesaid judgment order of May 20, 1966, and

The Court finding that the Defendants have threatened to and are attempting to convey and sell a purported fee simple title to the premises to other than Plaintiff, and that Plaintiff will be irreparably injured by such sale or conveyance and that Plaintiff has no adequate remedy at law to bar such conveyance or sale, and

The Court finding that the claims of Defendants in the premises are a cloud upon the title of Plaintiff in and to said land, which diminishes its value and interferes with the use or sale thereof, and which claims are illegal and void and should be vacated, removed, and set aside as a cloud upon the title of Plaintiff, and

The Court finding that the Defendant School District has had full knowledge of all of the pleadings and proceedings in this cause and has adopted as its own pleadings, the pleadings and arguments of the Defendant-Trustees and is bound by the findings and holdings of this Court in the same manner and to the same extent as Defendant Board of Trustees.

It Is Hereby Ordered, Adjudged And Decreed As Follows:

1. The motion of Plaintiff for summary judgment be and the same hereby is granted, and the motion of Defendant-Trustees for summary judgment be and the same is hereby denied.

BLEED THROUGH

(Appendix C)

2. All title of Defendants in the subject property does, by operation of the law, revert to Plaintiff, and the Plaintiff is hereby vested with fee simple absolute title to the premises.

3. All claims of defendants and either of them to the premises under color of the aforesaid judgment order of May 20, 1966, or any other title claimed by the defendants or either of them are illegal and void and they are hereby vacated and set aside as a cloud upon the title of Plaintiff.

4. Defendants, their agents and servants, and each of them, be and they hereby are permanently restrained and enjoined from conveying or attempting to convey or doing or permitting any act pertaining to conveying any purported fee simple title or any interest whatsoever to the premises in any manner, or from advertising, holding public or private sale of, or entering into negotiations for the sale of the premises or in any other way dealing with the premises, or from executing, recording, or causing to be executed or recorded any document purporting to convey any title or other interest to the premises.

5. Plaintiff shall be and hereby is ordered to tender and pay over to Defendant-Trustees and Defendant School District the sum of $88,000.00 being the sum paid to Plaintiff pursuant to the aforesaid judgment order of May 20, 1966, and that such tender may be made by uncertified check and shall constitute a due, full and legal tender by the Plaintiff to the Defendants.

6. The Defendant School District has had full knowledge of all of the pleadings and proceedings in this case and has

adopted as its own pleadings the pleadings and arguments of the Defendant-Trustees and is bound by the findings and holdings of this Court in the same manner and to the same extent as Defendant Board of Trustees.

The Court finds that no just reason exists for delay in the enforcement of or appeal from this Decree and Order.

Enter:

/s/ D. A. Covelli
Judge

BLEED THROUGH

APPENDIX D

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT — LAW DIVISION

CITY OF CHICAGO IN TRUST FOR THE USE OF SCHOOLS,
Plaintiff,
vs.
ALBERT J. SCHORSCH REALTY, et al.,
Defendants.
No. 74 L 5546

ORDER

This matter comes on to be heard in the above entitled cause on Defendant's Petition for Declaratory Judgment on Plaintiff's defenses to said Petition, and on Defendant's Motion for Judgment on the Pleadings and Plaintiff's response thereto, the Court having considered the arguments and briefs of counsel and now being fully advised in the premises, the Court therefore finds:

1. That the Board of Education of the City of Chicago acquired through certain condemnation proceedings bearing Cook County general case numbers of 65 L 7227 and 65 L 20763, certain real estate described as follows:

Parcel B

The North Two Hundred Thirty-seven (237) feet of the South Eight Hundred Seventeen and Forty-seven one hundredths feet (817.47) feet of Lot Six (6) of the Subdivision of James Pennoyer's Estate in Sections One (1), Two (2), Eleven (11), and Twelve (12), East of the Third Principal Meridian, excepting therefrom

the West Fifty-five feet (55) taken for street, also excepting therefrom the East One Hundred Eighty-three and Seventy-two one hundredths feet (183.72) of the West Four Hundred Seven and Forty-four one hundredths feet (407.44) of the South One Hundred eighteen and Fifty-five one hundredths feet (118.55) of the North Two Hundred thirty-seven feet (237) of the South Eight Hundred Seventeen and Forty-seven one hundredths feet (817.47) of said Lot Six (6) all in Cook County, Illinois;

Parcel C

The South half of the North Two Hundred Thirty-seven and three one hundredths feet (237.03) of the South One Thousand Fifty-four and fifty-one hundredths feet (1054.50) of Lot Six (6) (except the West Fifty-five feet (55) thereof) in the Subdivision of James Pennoyer's Estate in Sections One (1), Two (2), Eleven (11), and Twelve (12), Township Forty (40) North, Range Twelve (12), East of the Third Principal Meridian in Cook County, Illinois;

Parcel D

The North half of the North Two Hundred Thirty-seven and three one hundredths feet (237.03) of the South One Thousand Fifty-four and fifty-one hundredths feet (1054.50) of Lot Six (6) (excepting therefrom the West Fifty-five feet (55)) in the Subdivision of the James Pennoyer's Estate in Sections One (1), Two (2), Eleven (11), and Twelve (12), Township Forty (40) North, Range Twelve (12), East of the Third Principal Meridian, in Cook County, Illinois.

2. That pursuant to Section 34-20 of Chapter 122 of the Illinois Revised Statutes, title to the subject real estate herein is held in the name of the City of Chicago in Trust for the Use of Schools.

BLEED THROUGH

(Appendix D)

3. That the City of Chicago, in reference to said real estate,

> "is a mere passive trustee holding the naked legal title without any power or control in the management of such property." *Dalton* v. *Joseph Lumber Co.,* 340 Ill. App. 267, 91 N.E. 2d 450 (1950); and

that the City has no substantial interest in said real estate,

> "since the amendment of 1917 to the School Act, by which the Board is made a corporate entity and the City Council is no longer required to concur in any of its functions." *City of Chicago* v. *Board of Education,* 246 Ill. App. 405 (1927); and

that the City's sole function in reference to said real estate,

> "is merely ministerial and mandatory on request or action of said Board." (Id. Page 408)

4. That the plaintiff has admitted through the pleadings filed herein, that the subject real estate was and remains vacant, and has never, in whole or part, been used for any school purpose.

5. That the Board of Education on March 14, 1973 in Resolution 73-249 has indicated its desire to rescind its condemnation taking of said real estate and has resolved that a judicial determination be obtained as to whether or not under the Statutes of the State of Illinois and all other applicable law, title to said real estate can be revested in defendants or whether said real estate must be sold pursuant to the provisions of Section 34-21 of Ch. 122 of the Illinois Revised Statutes.

6. That because of the Board's Resolution No. 73-249, and in reliance on the Board's desire to rescind the con-

demnation taking and revest the defendants with title to said real estate, defendants herein have filed a petition for declaratory judgment to determine whether any and every disposition of real estate or interest therein held by plaintiff must be made solely and exclusively through the process described in Section 34-21 of Ch. 122 of the Illinois Revised Statutes.

7. That the condemnation award on deposit with the Treasurer of Cook County, for the use and benefit of the defendants herein, has never, in whole or in part, been taken down by any of the defendants to this action, and that said sum in its entirety, is presently on deposit with the Treasurer of Cook County.

8. That since the Board of Education by Resolution 73-249 has expressed its desire to rescind its condemnation taking and has neither desired nor sought a sale of subject real estate, the provisions of Section 34-21 of Ch. 122 of the Illinois Revised Statutes are not applicable to the facts of the instant case, and does not prohibit a reconveyance of the subject real estate from the plaintiff to the defendants.

It Is Therefore Ordered, Adjudged And Decreed that the duties and obligations of the parties hereto are as follows:

1. That it is the duty and obligation of plaintiff:

a. to transfer all its right, title and interest in and to Parcel B as hereinbefore described to La Salle National Bank of Chicago as Trustee under Trust 35232, successor in interest to John Przywara and Josephine Przywara, his wife;

BLEED THROUGH

(Appendix D)

b. to transfer all its right, title and interest in and to Parcel C as hereinbefore described to defendant National Bank of Albany Park in Chicago as Trustee of Trust 11-1030; and

c. to transfer all its right, title and interest in and to Parcel D as hereinbefore described to defendant National Bank of Albany Park in Chicago as Trustee of Trust 11-1030 as successor in interest to Exchange National Bank as Trustee of Trust 15166.

2. That upon completion of the transfer of all of plaintiff's right, title and interest in and to Parcels B, C and D, as hereinbefore described to defendants, it is the duty and obligation of defendants to transfer all of their right, title, and interest in and to those funds presently on deposit with the Treasurer of Cook County for the use and benefit of defendants herein to the plaintiff for the use and benefit of the Board of Education of the City of Chicago.

3. That this Court retain jurisdiction over this cause and over the parties hereto for the enforcement of this Order.

Dated: December 18, 1975

Enter:

/s/ Judge Abraham W. Brussell

Supreme Court, U. S.
FILED
MAR 8 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1171

LASALLE NATIONAL BANK, AS TRUSTEE ETC.,
Petitioner,

vs.

COUNTY BOARD OF SCHOOL TRUSTEES OF DUPAGE COUNTY; HINSDALE ELEMENTARY SCHOOL DISTRICT 181; AND MAC DIARMID-PALUMBO, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF OF RESPONDENT SCHOOL DISTRICT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

C. RICHARD JOHNSON,
Suite 4200,
One First National Plaza,
Chicago, Illinois 60603,
Attorney for Respondent, Community Consolidated School District No. 181 (misnamed in the caption).

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

BLEED THROUGH

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1171.

LASALLE NATIONAL BANK, AS TRUSTEE ETC.,
Petitioner,

vs.

COUNTY BOARD OF SCHOOL TRUSTEES OF DUPAGE COUNTY; HINSDALE ELEMENTARY SCHOOL DISTRICT 181; AND MAC DIARMID-PALUMBO, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF OF RESPONDENT SCHOOL DISTRICT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Because the statement of this simple case is garbled in the Petition for the Writ of Certiorari, it may be useful briefly to restate the nature of the case. In 1970, respondent school authorities acquired land by eminent domain for a new school house. The 1970 Judgment of the trial court in that action, entered by agreement of the parties, awarded the former owner (petitioner here) $360,000 for "fee simple title" to the land. The Judgment, from which no appeal was taken, also found that there was no damage to the remainder of petitioner's land.

Subsequently, it was determined to build the new school house elsewhere. Therefore, in 1972 respondent school authorities sought to sell the land at auction (as is required by Illinois law).

Petitioner then brought this state court action to require the school authorities to reconvey the land to it in return for the 1970 condemnation price or for an award of damages.

The Supreme Court of Illinois held that petitioner's claims here were barred by the *res judicata* effect of the 1970 eminent domain judgment. The 1970 order awarding fee simple title to the school authorities was held to be conclusive of the petitioner's present claim of a reverter interest in the land.

ARGUMENT.

Certiorari should not issue here for the following reasons:

1. No federal question of importance is at issue.

2. The decision of the Illinois Supreme Court was based on an adequate independent state ground, the state law doctrine of *res judicata.*

3. Petitioner's principal assertion that it was denied equal protection because trial courts in similar cases reached contrary results is absurd.

4. The Petition for a Writ of Certiorari fails to comply with the requirement of Rule 23(f) of the Rules of this Court. It fails to show that the constitutional issues argued here were adequately raised below. In fact, they were not.

BLEED THROUGH

CONCLUSION.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

C. RICHARD JOHNSON,
Suite 4200,
One First National Plaza,
Chicago, Illinois 60603,
Attorney for Respondent, Community Consolidated School District No. 181 (misnamed in the caption).

March 5, 1976.